

In the Matter of License No. A-49185 and all other Licenses,
Certificates and Documents

Issued to: GEORGE B. MCTURCK

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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GEORGE B. MCTURCK

This appeal had been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 18 July, 1955, an Examiner of the United States Coast Guard at New York, New York, suspended License No. A-49185 issued to George B. McTurck upon finding him guilty of negligence based upon a specification alleging in substance that while serving as the operator of the American motorboat FREDA M under authority of the license above described, on or about 11 October 1953, while said vessel was in the vicinity of Montauk Point, Long Island, he wrongfully operated said motorboat, with passengers for hire on board, in close proximity to shore with the resultant loss of one life.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening statement. By stipulation, the transcript of testimony and the exhibits of the Marine Board of Investigation convened to inquire into the capsizing of the FREDA M on 11 October 1953, were received in evidence.

Appellant offered in evidence his sworn testimony. He stated that no tide rips had developed at the time when a large swell broke under the boat and caused he to capsize about a half mile offshore.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his decision and concluded that the charge and specification had been proved. He then entered the order

suspending Appellant's License No. A-49185, and all other licenses, and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a period of nine months - three months outright suspension and six months suspension on probation until twelve months after the termination of the outright suspension.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 11 October 1953, Appellant was serving as the operator of the American motorboat FREDA M and acting under authority of his License No. A-49185 when the FREDA M capsized with six persons on board while engaged in pleasure fishing in the vicinity of Montauk Point, Long Island. One of the four passengers for hire did not survive this casualty.

The FREDA M was owned by Appellant who had operated fishing vessels in the Montauk Point area for four or five years. The FREDA M was a single screw fishing vessel of 14 gross tons, 38 feet 9 inches long, 12 feet 6 inches beam and 3 feet 6 inches in depth.

At about 0720 on 11 October 1953, she departed from Toma's Dock at Montauk, Long Island, with a charter party of five passengers for hire, the Appellant and his Mate. There was a northeasterly wind of force 4 (11 to 16 knots); swells from the southeast were approximately 4 feet in height; the sea was choppy with a flood tide; and visibility was about 7 miles although the weather was cloudy.

The FREDA M proceeded to the area east of Montauk Point Lighthouse for the purpose of fishing for striped bass. After about a half hour, Appellant observed that the fishing vessel CIGARETTE was in trouble. Her engine had become wet and stopped due to the shipping of water. The FREDA M towed the CIGARETTE until her engine was dry enough to start. The CIGARETTE resumed fishing but did not return to the Montauk Point area. Appellant continued in to port and put ashore a seasick passenger. The FREDA M then headed for the fishing area due east of Montauk Point Lighthouse.

Between 1130 and 1200, the FREDA M commenced making clockwise circular maneuvers at a speed of between one-half and one knot at a distance of one-fourth to one-half mile offshore while the four passengers trolled for the striped bass usually found close to shore near the rips. The tide had commenced ebbing and the choppy condition of the sea had increased considerably. Other conditions

remained substantially the same as earlier except that the height of the sea had increased from about 4 feet to approximately 5 feet. One of the passengers became seasick and went below to lie on a bunk. The latter was almost thrown out of the bunk as the boat rolled in the rough sea. The bottoms of other boats were observed from the FREDA M as they rose on the crest of the swells. Three of the passengers continued to troll while Appellant steered the vessel from the top of the pilot house.

At about 1245, the FREDA M was on a northwesterly course with a following sea. She was about one-fourth of a mile offshore, bearing 040 degrees true from the Lighthouse, on the edge of the 20 foot depth curve in steeply shoaling waters. Most of the waves were breaking approximately a hundred yards inshore of the FREDA M. At this time, an unusually large swell about 20 feet high made up a short distance astern of the FREDA M. Appellant saw this swell when it was some 30 or 40 feet dead astern of his vessel. He did not have time to do anything to avoid it. The swell lifted up the stern of the FREDA M dropping the bow so that her pulpit was even with the water. Appellant lost steering control. The fishing vessel briefly rode the crest of the swell and broached to as the swell broke under her. The vessel rolled over on her starboard side and capsized. The motorboat C.M.B. was the closest boat to the FREDA M at a distance of three-eighths of a mile. The C.M.B. rescued all personnel from the water except one passenger whose body was not recovered. The FREDA M was washed ashore south of the Lighthouse. No other swells were observed breaking near the FREDA M. either before or after the casualty.

Appellant had held a motorboat operator's license for about 20 years without any prior record.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the decision of the Examiner is not supported by the required reliable, probative and substantial evidence but is based upon sheer conjecture and speculation.

It was gross error for the Examiner to ignore the uncontradicted expert opinion of Jones, BMC(L), Officer-in-Charge of the Montauk Point Light Station, that the FREDA M was not too close to the beach under the prevailing sea conditions.

The location of the FREDA M was not "a competent producing cause of the disaster" which was caused by an uncommon, huge wave. No other wave broke in this vicinity either before or after the catastrophe. The evidence shows that there were other vessels in addition to the C.M.B. in this fishing area at the time of the

casualty.

The evidence is uncontroverted and the Examiner so found that Appellant was navigating his vessel 100 yards offshore of the line of breakers and that there were no tide rips at the time of the casualty. Accordingly, the fact that the tide was ebbing is not material and does not support the Examiner's decision.

In conclusion, it is respectfully submitted that the decision should be reversed and the charge found to be not proved.

APPEARANCES: Messrs. Dow and Symmers of New York City by
 William Warner, Esquire, of counsel.

OPINION

The evidence in the record does not convince me that Appellant's conduct amounted to negligence. It is established that the Appellant was not navigating in tide rips; she was a hundred yards offshore of the line of breakers; the cause of the casualty was a wave of extraordinary proportions; and there was not another such wave, on that day, either before or after the accident to the FREDA M.

Although the sea was somewhat choppy off Montauk Point Lighthouse, the boat was not shipping water. Under these circumstances, I do not think that a prudent seaman with Appellant's extensive experience, would consider it too risk to take passengers fishing where Appellant was operating his fishing vessel. This is supported by the testimony of BMC Jones who stated that it was common practice for others to fish where Applicant was. The fishing vessel C.M.B. had been in the same place shortly before the accident. She and other fishing vessels were nearby when the FREDA M capsized. Insofar as the record shows, the last such incident as this occurred in 1947.

For these reasons, it is my opinion that Appellant was guilty of no more than an error of judgment, or the exercise of poor judgment, which verged on, but did not amount to, negligence. In view of Appellant's many years experience operating fishing vessels, it is believed that his choice of this area was not so unreasonable as to constitute negligence on his part. In all likelihood, no difficulty would have been encountered except for this one large wave which he was not bound to anticipate under the circumstances. In The Clarence L. Blakeslee (C.C.A. 2, 1917), 243 Fed 365, where a seaman was held to be not negligent, the court said:

"Navigators are not to be charged with negligence

unless they make a decision which nautical experience and good seamanship could condemn as unjustifiable at the time and under the circumstances shown."

Based on this standard, the facts of this case do not show that Appellant was negligent in his decision to fish in this particular area.

Since the allegation of negligence is not supported by substantial evidence, the conclusion that the specification was proved is reversed. Although it has been concluded that Appellant complied with the minimum requirements of ordinary care and skill under the circumstances, it is hoped that the knowledge that the knowledge of this mishap will act as a deterrent to Appellant and other while fishing near Montauk Point in the future.

ORDER

The charge and specification are dismissed. The order of the Examiner dated at New York, New York, on 18 July, 1955 is VACATED.

A. C. RICHMOND
Vice Admiral, United States Coast Guard
COMMANDANT

Dated at Washington, D. C., this 25th day of July, 1956.